

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case Number: 1:12-cv-00257-JB-GBW

LARRY GOLDSTONE, CLARENCE G. SIMMONS,
III, and JANE E. STARRETT,

Defendants.

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

On March 24, 2015, the Supreme Court imposed strict limits on liability for opinion statements in securities cases—an issue central to Defendants' Motions for Summary Judgment. *See* Doc. 201 at 18, 42. In Omnicare, Inc. v. Laborers District Council Constr. Indus. Pension Fund, No. 13-435, slip op. (Mar. 24, 2015), the Court confirmed that actual disbelief is required to establish misrepresentation liability for opinions, holding that “a sincere statement of pure opinion is not an ‘untrue statement of material fact,’ regardless whether an investor can ultimately prove the belief wrong,” and that the prohibition on untrue statements of *fact* “does not allow investors to second-guess inherently subjective and uncertain assessments.” 9. Misrepresentation liability for opinions “requires proving an issuer did not believe them.” 16.

The Court also considered whether a sincerely held opinion can be misleading by omission, observing that “liability [exists] only for the omission of material facts that cannot be squared with [] a fair reading” of the opinion. 14. Importantly, (i) this inquiry “always depends on context” such as “hedges, disclaimers, or qualifications,” which can “make clear the real tentativeness of [the issuer’s] belief” (14, 19-20); (ii) “opinions sometimes rest on a weighing of competing facts” and do not become misleading “when[ever] an issuer knows, but fails to

disclose, some fact cutting the other way” (13); (iii) “a statement of opinion is not misleading just because external facts show the opinion to be incorrect” (11); and (iv) reasonable investors “do[] not expect that *every* fact known to an issuer supports its opinion” (13).

Here, the SEC lacks evidence challenging the sincerity of Defendants’ OTTI opinion, or demonstrating that reasonable investors would consider that opinion misleading in context. Defendants were not required to disclose the alleged “competing facts” cutting against their opinion. 13. The Form 10-K cautioned that OTTI is an “accounting estimate ... requir[ing] management judgment” as to Thornburg’s ability to hold assets, that Thornburg “might need to selectively sell assets ... to meet [future] margin calls,” and that “there is no assurance that [Thornburg] ... will be able to satisfy additional margin calls.”

Dated: March 27, 2015

Respectfully submitted,

/s/ Randall R. Lee

Randall R. Lee

Jessica F. Kurzban

Daniel R. Crump

WILMER CUTLER PICKERING HALE and DORR LLP

350 S. Grand Avenue, Suite 2100

Los Angeles, CA 90071

Telephone: (213) 443-5300

Facsimile: (213) 443-5400

randall.lee@wilmerhale.com

jessica.kurzban@wilmerhale.com

daniel.crump@wilmerhale.com

John A. Valentine
WILMER CUTLER PICKERING HALE and DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
john.valentine@wilmerhale.com

*Attorneys for Defendants Larry Goldstone and Clarence
G. Simmons, III*

-and-

Jerry L. Marks
Robert J. Liubicic
MILBANK, TWEED, HADLEY & McCLOY LLP
601 S. Figueroa Street, 30th Floor
Los Angeles, CA 90017
Telephone: (213) 892-4000
Facsimile: (213) 629-5063
Email: jmarks@milbank.com
rliubicic@milbank.com

Attorneys for Defendant Jane E. Starrett

-and-

Bruce Hall
Andrew G. Schultz
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
P. O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Facsimile: (505) 768-7395
bhall@rodey.com
aschultz@rodey.com

*Attorneys for Defendants Larry Goldstone, Clarence G.
Simmons, III, and Jane E. Starrett*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 27, 2015 the foregoing Notice of Supplemental Authority was electronically filed with the Clerk of Court using the CM/ECF system that that will send notification of such filing to all counsel of record.

Michael H. Hoses
Assistant United States Attorney
P.O. Box 607
Albuquerque, NM 87103
michael.hoses@usdoj.gov

Stephen C. McKenna
Gregory Kasper
Dugan Bliss
Securities & Exchange Commission
1801 California Street, Suite 1500
Denver, CO 80202
mckennas@sec.gov
kasperg@sec.gov
blissd@sec.gov

MILBANK, TWEED, HADLEY &
MCCOY LLP
Thomas A. Arena
1 Chase Manhattan Plaza
New York, NY 10005
Telephone: (212) 530-5000
Facsimile: (212) 530-5219
tarena@milbank.com

WILMER CUTLER PICKERING
HALE AND DORR LLP
John A. Valentine
April N. Williams
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
john.valentine@wilmerhale.com
april.williams@wilmerhale.com

MILBANK, TWEED, HADLEY &
MCCLOY LLP
Jerry L. Marks
Robert J. Liubicic
Alisa Schlesinger
Elena Kilberg
601 S. Figueroa Street, 30th Floor
Los Angeles, CA 90017
Telephone: (213) 892-4000
Facsimile: (213) 629-5063
jmarks@milbank.com
rliubicic@milbank.com
aschlesinger@milbank.com
ekilberg@milbank.com

WILMER CUTLER PICKERING
HALE AND DORR LLP
Randall R. Lee
Jessica F. Kurzban
350 South Grand Ave., Suite 2100
Los Angeles, CA 90071
Telephone: (213) 443-5300
Facsimile: (213) 443-5400
randall.lee@wilmerhale.com
jessica.kurzban@wilmerhale.com

WILMER CUTLER PICKERING
HALE AND DORR LLP
Christopher W. Johnstone
950 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 858-6000
Facsimile: (650) 858-6100
chris.johnstone@wilmerhale.com
alanna.buchanan@wilmerhale.com

RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.

Andrew G. Schultz

Bruce D. Hall

Melanie B. Stambaugh

201 3rd Street NW, Suite 2200

P.O. Box 1888

Albuquerque, NM 87102

aschultz@rodey.com

bhall@rodey.com

mstambaugh@rodey.com

WILMER CUTLER PICKERING HALE AND DORR LLP

By /s/ Daniel Crump
Daniel Crump